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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 562

ELIZABETH S. HALBACH AND FRANKLIN H. STAFFORD, AS TRUSTEES UNDER AGREEMENT OF TRUST MADE BY ERNEST K. HALBACH, DATED DECEMBER 6, 1940, PETITIONERS

v.

JAMES E. MARKHAM, AS ALIEN PROPERTY CUSTODIAN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court for the District of New Jersey (R. 66–79) is reported at 106 F. Supp. 475. The *per curiam* opinion of the Court of Appeals for the Third Circuit (R. 398–399) is reported at 207 F. 2d 503.

JURISDICTION

The judgment of the Court of Appeals was entered on November 2, 1953 (R. 399). The petition for a writ of certiorari was filed on

January 30, 1954. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Were the two courts below correct in holding that there has been a "complete failure to prove duress" in the agreement of settlement of this case in 1945, and that the proofs "expressly eliminate any thought of deprivation of free agency in Halbach and his family"?

2. Were the Attorney General and the Custodian authorized, in a suit for the return of vested property under Section 9 (a) of the Trading with the Enemy Act, to settle the case by relinquishing to the plaintiff the portion of the property agreed by the compromise to be non-enemy, and retaining the remainder, agreed to be enemy?

STATUTES INVOLVED

The relevant provisions of the Trading with the Enemy Act, 40 Stat. 411, as amended, 50 U. S. C. App. 1 *et seq.*, are set forth in the Appendix, *infra,* pp. 30–34.

STATEMENT

The present litigation concerns the propriety of the settlement, in 1945, of an action under Section 9 (a) of the Trading with the Enemy Act for the return of certain shares of stock in General Dyestuff Corporation which had been vested by the Alien Property Custodian. These

shares of stock were held under a trust, created in 1940, and petitioners are the successors in interest to the trustees. The pertinent facts are as follows:

Prior to the outbreak of World War II, General Dyestuff Corporation, hereinafter referred to as "GDC," was engaged in the importation and sale of dyestuffs produced by I. G. Farben in Germany. It was also the exclusive sales agent for dyestuffs manufactured by General Aniline & Film Corporation, a Delaware corporation (R. 84–85, 135). Both properties were vested by the Alien Property Custodian in the first half of 1942 (R. 30–31).

The donor of the trust involved, who is also the father of the beneficiaries (the present petitioners), is Mr. Ernest K. Halbach, a native-born American citizen (R. 20, 22). Mr. Halbach had been an officer and director of GDC from its incorporation in 1925, general manager from 1926, and president from 1930 to the vesting in 1942 (R. 21, 110). He is referred to herein as the petitioner, because the merits of the case have revolved about him and because he controlled the settlement in 1945.

Mr. Halbach had also been a stockholder in GDC from the outset, and from 1940 he was the majority stockholder. The trust he created in 1940 consisted of his majority interest in GDC—3150 shares—increased to 4725 shares by a stock dividend made before the vesting in 1942 (R. 21–

23, 41). The shares in GDC had from the time of incorporation been subject to a purchase option binding the stockholders. Originally, the options ran directly to I. G. Farben; they were continued and renewed and at the time of vesting ran to GDC itself. The option price, at which the shares could be repurchased from the stockholders, remained constant, and was the par value of the stock, $100 plus 6% interest from the date of the last dividend. The stockholders paid $100 for their shares when they bought them (R. 32 (ftn.)–33, 135–136, 141–142).

Accordingly, Mr. Halbach had paid $210,000 for 2100 shares. These were increased to 3150 shares by a 50% stock dividend prior to the creation of the trust in 1940. After the creation of the trust but before the vesting, the 3150 shares were increased by another 50% stock dividend to a total of 4725 shares. In the gift tax return made on the gift in trust in 1940, Mr. Halbach, consistently, valued the shares transferred at $100 each (R. 70, 22–23, 92, 135–136, 141–142).

Immediately upon the declaration of war in December 1941, the Treasury took over supervision of GDC (R. 83). Vesting of all the stock of GDC, by the Alien Property Custodian pursuant to the Trading with the Enemy Act, followed on June 30, 1942, and in the next month the Treasury, under the same Act, froze Mr. Halbach's personal bank accounts (R. 8–10, 83,

101–102, 107). The Vesting Order provided, *inter alia* (R. 8–9):

> Such property and any or all of the proceeds thereof shall be held in a special account pending further determination of the Alien Property Custodian. This shall not be deemed to limit the powers of the Alien Property Custodian to return such property or the proceeds thereof, or to indicate that compensation will not be paid in lieu thereof, if and when it should be determined that such return or compensation should be made.

The Order was issued and signed by Mr. Leo T. Crowley, Alien Property Custodian from the beginning of the Office on March 12, 1942 until March 1944 (R. 30–31). The issuance of the Order was recommended by the Executive Committee of the Office of Alien Property Custodian, whose members were the ranking members of Mr. Crowley's staff (R. 106).

Mr. James E. Markham, Deputy Custodian from March 1942 to March 1944 (and Custodian thereafter, to 1946), was at the time of vesting a member of the Executive Committee. Mr. Markham testified in this proceeding that the Committee was unanimous in its recommendation to vest. Further, he testified that it acted on evidence gathered by the Treasury Department in its investigations of GDC and General Aniline & Film Corporation early in 1942 "tending to

show that GDC was under enemy domination and control, that Halbach was acting as a cloak for the enemy, and that the enemy had beneficial ownership of all of the capital stock of the corporation through a series of option agreements to which the stock had been subject." (R. 105–106.)

Mr. Markham testified, too, that he "realized that there was evidence of Halbach's long and intimate association with the enemy and of the enemy's beneficial ownership of his stock" (R. 109). He "followed the case carefully during [his] tenure" (R. 105). "Never during my tenure as Deputy Custodian and Custodian did I come to the conclusion that the vesting was not justified or that ways should be explored to return the stock to Halbach" (R. 107).

After the vesting Mr. Halbach resigned as president of GDC but was retained as a consultant (R. 21–22, 107, 109). From the time of vesting in 1942 until his retirement on pension on August 1, 1950, his salary and bonuses from the corporation totaled $558,600 (R. 110–111).

On January 3, 1944, a year and a half after the vesting, petitioner filed with the Office of Alien Property Custodian an administrative claim for the return of the 4725 shares vested from him (R. 7, 12). He did not ask for a hearing under the regulations then in force but rather brought suit on March 17, 1944 (8 C. F. R., 1943 Supp.,

Part 501, p. 370, 8 F. R. 16709). His complaint (R. 5–10) sought the return of the stock under Section 9 (a) of the Trading with the Enemy Act. The Custodian's answer denied that petitioner was the owner of the stock (R. 11–12).

In January 1945, as the case was approaching trial, the parties agreed to a settlement and early in February petitioner dismissed his case in consideration of $557,550, or $118 per share for the 4725 shares in dispute, the amount payable on the exercise of the option (R. 67, 13–16, 86–88, 89–104, 108–109, 119–120, 133–145, 146–153). It is this settlement which is being attacked in this proceeding.

Negotiations leading to the settlement had begun three months earlier in November 1944. In these negotiations petitioner was represented by Stoddard M. Stevens, Jr., Esq., a partner in Sullivan & Cromwell. Respondent was represented by then Assistant Attorney General Herbert Wechsler, a New York lawyer and professor of law. The Office of Alien Property Custodian was then an agency separate from the Department of Justice and Assistant Attorney General Wechsler was acting for the Attorney General, whose duty it was to represent the Custodian in litigation (R. 69–70, 89–91, 112–114, 116).

Negotiations were initiated by petitioner and were continued at a series of meetings between counsel. At one meeting Mr. Halbach was present

and actively participated in the discussions (R. 69–71, 60–61, 90–91, 95–98, 116–117).

Mr. Wechsler, in a detailed affidavit based on memoranda he wrote as the events occurred, testified to the course of the negotiations (R. 89–104). He refused to include in the negotiations any consideration of such extraneous issues as Mr. Halbach's future employment with the corporation, the disposition of a pending indictment against Mr. Halbach for an antitrust violation, and the question of the freezing of Mr. Halbach's assets by the Treasury (R. 70–71, 91, 92–93, 97–98, 101–102). He testified that the Department of Justice did not, in the negotiations, seek to resolve the money differences between the parties merely in bargaining terms (R. 97). The Government's theory of settlement was based upon the option, which in the Government's view was the means by which the enemy interests had exercised control of the corporation. The amount payable on exercise of the option, $118 per share, was therefore, under Mr. Wechsler's position, the maximum interest assertible or recoverable by the petitioner (R. 70, 91–92, 94, 96–97, 108–109).

Mr. Stevens, without the benefit of contemporaneous memoranda such as Mr. Wechsler had made, remembered some but not all the facts testified to by Mr. Wechsler, among them Mr. Wechsler's position that the option put a ceiling

on a possible settlement price (R. 125–133).[1] This ceiling, insisted upon by the Government, was the basis of the settlement agreement (R. 79, 100, 108–109, 120, 135–136, 141–145).

Of very substantial significance in the agreement reached was the fact that Mr. Halbach himself had in 1940 valued the shares at $100 each, in the gift tax return he made at the time he placed the shares in trust (R. 70, 92, 108–109). In the course of the negotiations, Mr. Wechsler pointed to this valuation as confirming his position. He also pointed out the possibility that settlement at $169, proposed by Mr. Halbach, would result in a tax on the additional $69 as income rather than as capital gain, with only a small actual monetary difference to the petitioner. (R. 92, 99.)

The eventual settlement involved here was only one of three settlements involving four parties—the trustees, Mr. Halbach, the Alien Property Custodian and the Bureau of Internal Revenue. The basic settlement figure of $100 per share, agreed to by Mr. Halbach, the trustees and the Custodian, was accepted by the Bureau of Internal Revenue as settling both the gift tax

[1] The details which Mr. Stevens could recall of the settlement negotiations corroborated the facts as stated in Mr. Wechsler's affidavit. As to other details mentioned by Mr. Wechsler, Mr. Stevens made it clear that his lack of recollection did not mean that the facts were not as stated by Mr. Wechsler. After reading Mr. Wechsler's affidavit, Mr. Stevens testified that "I have not any reason to challenge any of the statements that Mr. Wechsler has made here" (R. 126).

controversy with Mr. Halbach and an income tax issue with the trustees. The $100 became the agreed valuation on which the Bureau based the tax due from Mr. Halbach on the gift in trust of the shares in 1940, as well as the income tax due from the trustees on the amount realized from the settlement. This income, moreover, was agreed to be taxed as capital gain rather than ordinary income (R. 70, 100–102, 132–134, 135–145). Mr. Stevens testified that the gift tax and income tax closings with the Bureau of Internal Revenue were a part of and conditions precedent to the settlement (R. 121–122, 124–125, 132–134, 135–145). His associate informed the Bureau at the time that the tax considerations were "a principal motivating consideration in making the settlement" (R. 145).

After agreement was reached between Mr. Wechsler and Mr. Stevens, Mr. Markham, the Alien Property Custodian, recommended that the Attorney General accept the settlement because, he testified, "I was satisfied that settlement at that price represented a fair settlement both for Halbach and for the Government" (R. 108). The Attorney General then gave his approval (R. 102). The Custodian made payment by using dividends on the GDC stock paid to him as the sole stockholder and thereafter deposited in a special account with the Treasurer of the United States, established pursuant to the Vesting Order (R. 77–78, 135–136, 143–145). The Attorney

General advised the Custodian that he had authority so to do (R. 102).

Trial had been set for January 29, 1945 (R. 67, 135–136, 141–145). On January 26 and 27, the trustees, Mr. Halbach, and the latter's wife and two children, the beneficiaries, all executed releases and covenants not to sue, in return for $557,550 paid to them by the Custodian (R. 67, 13, 20–21, 146–153). Accordingly, a stipulation of discontinuance with prejudice was filed on February 2, in pursuance of Federal Rule 41 (a) (1) (ii) (R. 67, 16, 133–134, 139).

Mr. Stevens, counsel for Halbach and the trustees, was also counsel for seven other stockholders in GDC who had filed similar suits. The settlement which Mr. Stevens negotiated for Halbach was on behalf of these other stockholders as well. Documents signed simultaneously settled their actions on the same terms as the Halbach action; they, too, were parties to the income tax settlement with the Bureau of Internal Revenue. (R. 115–116, 132–134, 135–145.)

There the matter rested for five and a half years.

In August 1950, Mr. Halbach, having earned $558,600 from his employment with GDC since 1942, retired on a pension of $18,000 per annum (R. 68, 110–111).

On January 23, 1951, five months thereafter, and almost six years to the day after the settlement, a motion was made under Rule 60 (b)

of the Federal Rules of Civil Procedure[1] to set aside the settlement and dismissal of the suit and to restore the case to the trial calendar. The grounds were (a) duress upon Mr. Halbach in the settlement and (b) a lack of legal authority on the part of the Attorney General and the Custodian to make the settlement (R. 2, 17 *et seq.*). Proof was made by deposition and affidavits, as set out above. After hearing, the District Court, per Circuit Judge Gerald McLaughlin, specially designated, denied the motion with an opinion (R. 66–79, 80). The Court of

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[1] Rule 60 (b) provides as follows:

"MISTAKES; INADVERTENCE; EXCUSABLE NEGLECT; NEWLY DISCOVERED EVIDENCE; FRAUD, ETC. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59 (b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment,

Appeals affirmed *per curiam,* on the "comprehensive and well reasoned opinion filed by Judge McLaughlin" (R. 398–399).[3]

ARGUMENT

I

THE CLAIMED DURESS AND OVERREACHING

Petitioner contends (Pet. 5, 9, 20, 33 *et seq.*) that the two courts below applied an improper standard in judging his contentions of duress. The record rather shows that the District Court, approved by the Court of Appeals, applied the highest possible standard, examining the facts of each contention made by petitioner and finding that the showing "utterly fails" to support the allegations of duress (R. 67, 72). Each charge was found to be baseless and petitioner does not here seem to renew the charges he made before

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order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Section 57 of the Judicial Code, U. S. C., Title 28, § 118, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action."

[3] No question has been raised as to failure to substitute Mr. Markham's successors as Alien Property Custodian because the motion sought such a substitution (R. 17–19). Substitution under Federal Rule 25 (d), moreover, applies to pending actions and between 1945 and 1951 the original proceeding was closed. It remains closed unless and until the present motion is granted. Cf. Rule 60 (b), n. 2, *supra*, p. 12.

the District Court.[4] Those charges have now been properly rejected by two courts and should not be again reviewed here. The new charge on which the petition is mainly based was rejected by the court below and is no more worthy of consideration by this Court.

1. For the charges canvassed in detail by Judge McLaughlin, petitioner now substitutes another, made for the first time in the Court of Appeals two years after the motion to reopen the settlement and eight years after the event. This is a charge that Assistant Attorney General Wechsler threatened Halbach's counsel, Mr. Stevens of Sullivan & Cromwell, with an illegal "stratagem." This "stratagem" is said to have been the threatened discharge of Halbach or a threatened offer of sale of the vested stock which, in turn, would bring the option into play and thereby give the Government the right to buy out Halbach at the option price of $118 (the sum at

[4] Petitioner quotes, from the record of a legislative hearing, letters on behalf of Halbach, from the late Senator Taft and from Senator Langer (Pet. 6–7, 39–40). From the same hearing, petitioner also quotes (Pet. 38–39) a statement by Colonel Dallas S. Townsend, the present Director of the Office of Alien Property and one of undersigned counsel. Colonel Townsend stated that there were aspects of the treatment of Mr. Halbach which should be "deeply regretted." The statement had reference to the interrogation of Mr. Halbach's wife by Government agents at a time when she was ill. The District Court pointed out that there is no sign that these agents, wholly unidentified, questioned Mrs. Halbach against her will or had any knowledge that she was ill (R. 69, 165).

which settlement was eventually agreed) (Pet. 36–37, 9, 18–19, 20). This intricate structure (said by petitioner to be conclusive of duress) is built entirely upon the first sentence of Mr. Wechsler's response, at the first settlement meeting, to Mr. Stevens' statement that if the case went to trial Halbach might recover everything or nothing. Mr. Wechsler's affidavit states (R. 92):

> I remember commenting that that position seemed impossible to me, since I believed that the Custodian could bring about a situation in which he could exercise the options on the basis of the $100 figure. I also called attention to the fact that when Mr. Halbach had transferred the shares of stock to the plaintiff trustees, the stock had been valued at $100 a share for gift tax purposes. I urged therefore that Mr. Halbach himself had recognized the validity of the Department's position that his maximum economic interest in the stock, if any, did not exceed $100 a share.

Mr. Wechsler was stating the Government's legal position that, at the least, the right to control the corporation and exercise the option was enemy property; that the $100 option price therefore put an economic limit on Halbach's interest in the property and that in any event the Government could come out of the trial of the case with a judgment under which it would have the benefit of the option. The District Court found this

position to be based on "substantial grounds" (R. 79, 70, 91–92, 94, 96–97, 108–109).

In any event, and whatever the meaning of Mr. Wechsler's statement, there is nothing to show that Mr. Stevens took the statement to be coercive or to mean what petitioner now takes it to mean. Mr. Stevens' only response to Mr. Wechsler was a comment that the $100 valuation for gift tax purposes was disputed by the Treasury (R. 92). He certainly did not interpret Mr. Wechsler's statement as a threat of illegal action [5] or as otherwise improper. For he testified that Mr. Wechsler and the Department of Justice acted with propriety throughout and petitioner did not cross-examine him at all, not even to ask how he understood Mr. Wechsler's statement (R. 71, 245, 135). Petitioner must therefore fail in

[5] An attempt to sell the stock despite the pendency of the action would have brought into play Section 9 (a) of the Act, which provides that when a suit for return of vested property is instituted the "property shall be retained in the custody of the Alien Property Custodian * * * until any final judgment" is rendered in the suit (Sec. 9 (a), App. pp. 32, 33, *infra*). The cases hold that "the property is to be retained by the Custodian to abide the result." *Stoehr* v. *Wallace*, 255 U. S. 239, 246. In *Standard Oil Co.* v. *Markham*, 57 F. Supp. 332 (S. D. N. Y.), decided September 5, 1944, in the month before the settlement negotiations began (R. 90), the court stated that it had full power to compel the Custodian to keep the property intact (57 F. Supp. at 334–335). See also *Sielcken-Schwarz* v. *American Factors*, 60 F. 2d 43 (C. A. 2), certiorari denied, 287 U. S. 654; *Draeger Shipping Co.* v. *Crowley*, 49 F. Supp. 215 (S. D. N. Y.). *Cf. Sigg-Fehr* v. *White*, 285 Fed. 949, 954 (C. A. D. C.).

his attempt to prove duress simply by citing the Government's bona fide statement of its legal position, which was, at the very least, a substantial one (R. 79, 70).

2. In the courts below the Government was not content to argue that petitioner failed to meet his burden or to satisfy a given standard of duress. In view of the serious nature of the charges, the Government made no defenses which might be called "technical," and set out to prove affirmatively that there had been no impropriety whatsoever. And the courts below held that the proofs submitted by the Government "expressly eliminate any thought of deprivation of free agency in Halbach and his family at the time of the execution of these instruments" (R. 72).

These proofs include the nature and conduct of the settlement negotiations, the absence of threats or improper considerations, the profit to Halbach from the bargain he struck, his access to the courts for a trial, his refusal to accept the advice of his supporters that he go to trial if he wanted vindication, and his years of delay in charging duress. We turn to these matters.

a. *The settlement negotiations.*—The settlement negotiations were reviewed in detail by the District Court (R. 69–72). They were "protracted" and at "arm's-length"; Halbach was represented by "outstanding independent counsel" (R. 69–70, 72). Halbach participated in the negotiations (R. 70–71, 95–98). He negotiated in a coherent,

rational and forceful manner, as a careful businessman would when seeking to make a good bargain (R. 98). He never intimated that he felt under duress (R. 71, 90, 98, 104). The Government's theory of settlement (discussed *supra*, pp. 8, 15–16), far from being extreme, was explicitly held below to rest on "substantial grounds" (R. 79, 70).

b. *The absence of threats or impropriety.*—The record shows that no improper considerations were taken into account by the Government (R. 70–71, 91, 97–98, 101). No threats were made and petitioner's charges of threats or improper action were retracted or shown to be baseless, as follows:

(i) Mr. Halbach charged that Mr. Markham, in a conversation with Mr. Stevens, had threatened him (Halbach) with a concentration camp (R. 166, 217–221, 389). Mr. Markham denied this (R. 106). Demonstration that the charge was without foundation was supplied by Mr. Stevens, who testified firmly that he had no recollection of any concentration camp statement by Mr. Markham; that he would have resented any such remark if it had been made; that he would have expressed his resentment; and that he did not recall expressing any such resentment (R. 217–221).

(ii) Other charges of illegal threats and action were made in an affidavit drawn for Mr. Crowley and signed by him. The affidavit used such words

as "contrived constant pressure," "compulsion," "extra-legal methods," "hunted," "hounded," and "forced." Presented with this affidavit in his deposition, Mr. Crowley disavowed every one of these charges (*cf.* R. 171 with R. 265–273, 288–292, 296–302; *cf.* R. 181 with R. 355–356; *cf.* R. 177 with R. 329–331; *cf.* R. 181 with R. 357–363).

(iii) Mr. Wechsler, Mr. Markham, Mr. Crowley and Mr. Stevens denied any improper conduct or any knowledge of improper conduct (R. 71, 98, 105, 106, 108, 225–228, 238–256, 355–363). "It is evident from the Stevens deposition," the District Court held, "that there was no duress exercised on behalf of the Government to bring about the settlement" (R. 71).

c. *Halbach's opportunity to reflect and his desire to settle.*—The negotiations continued from November 1944 through January 1945. Halbach had ample opportunity to reflect and consult with his counsel, his family and advisors (R. 69–70, 90–102). He was advised by his family, by his trustees, and by Mr. Crowley to go to trial if he wanted vindication (R. 186–189, 354–355; *cf.* 336, 339, 346–347, 367–369). (He has neither revealed the advice he received from Mr. Stevens nor waived his privilege so as to permit Mr. Stevens to testify (R. 71, 212–217, 220–223, 233–235, 256–258)). He was under no economic necessity, having earned $228,600 in the three years 1942, 1943, and 1944 (R. 110). The District Court empha-

sized that the "Federal court was open to him for a consideration on the merits of his family's rights in the stock" (R. 72). He nevertheless wanted to make a bargain and not go to trial.

d. *Halbach's bargain.*—As we have already noted, the bargain was based on the $100 option price plus the interest specified in the option. The $100 figure was the amount at which Halbach himself had valued the stock (R. 70, 92, 108–109; see pp. 4, 9, 15, *supra*). Moreover, he had paid only $100 for each of the shares which he bought. Many of the shares he had not bought, but received as stock dividends (R. 22, 135–136, 141–142; see pp. 3–4, *supra*). For his 4725 shares he had paid only $210,000, while the Government's offer totaled $557,550 (R. 67, 70; see pp. 4, 7, *supra*). Aside from these attractions, the settlement had income and gift tax features advantageous to him (R. 70, 133–134, 135–145; see pp. 9–10, *supra*). (Other stockholders, whose stock, subject to the same option, had also been vested, also found the offer fair and settled on this same basis (see p. 11, *supra*).) An associate of Mr. Stevens informed the Bureau of Internal Revenue at the time that "the taxable status" of the settlement "is, from the point of view of the claimant stockholders, a principal motivating consideration in making the settlement" (R. 145).

e. *The long delay.*—Petitioner has as yet, eight years after the settlement, made no attempt to

explain what Judge McLaughlin called the "unwarrantably long delay" in charging duress (R. 72). One possible explanation of the delay from January 1945 until January 1951 is that petitioner waited until he had finished his career with GDC, a career which had brought him, in the nine years since the vesting, a total of $558,600, and a pension of $18,000 per annum (*supra,* p. 11). The District Court pointed out that "Second guessing, subsequent events, hope of further gain, expediency, however worded, can never spell out duress" (R. 72). So far as the Government is concerned the fact is that by 1951 the evidence had grown stale, witnesses had died, and proof of the enemy interest in the vested shares would be much more difficult.

II

THE CLAIMED LACK OF LEGAL AUTHORITY TO MAKE THE SETTLEMENT

With no citations to the record, petitioner repeatedly asserts that the Custodian classified Halbach as both enemy and nonenemy (Pet. 5, 8, 19–20, 23, 30–31). To these assertions are added the parallel conclusion that in dealing with Halbach the Custodian was violating the Act by trading with an enemy (Pet. 5). The fact is, however, that neither the Custodian nor the Attorney General intimated or approved such inconsistent positions, or took any action on the premise that Halbach was part enemy and part nonenemy.

The action taken was, rather, on the basis of the division of property interests in the stock in issue.

Halbach was an American citizen. The Vesting Order (R. 8–9) was issued in the belief that the stock and the option were entirely enemy property. The agreed settlement was founded upon the all but explicit recognition by both parties that the stock in Halbach's hands had been subject to an option which, though it ran to GDC, was in fact under enemy control and thus could be exercised by the enemy on payment to Halbach of $118 per share; that this option was the property of the Custodian by virtue of the Vesting Order; that the stock had a value in Mr. Halbach's hands of at most $118 per share; and that such a dollar interest in each share, and no more, was by agreement to be treated as non-enemy property and returned to Mr. Halbach, the remainder to be retained as enemy property by the same agreement. See pp. 4, 8–9, 15–16, *supra*.

A settlement agreement on this basis may be rested upon either or a combination of several powers available to the Custodian and the Attorney General, then separate officers. These powers are found in Section 5 (b) of the Trading with the Enemy Act, in Section 9 (a), and generally in the Attorney General's authority over Government litigation.

1. *Section 5 (b)*.—Section 5 (b) (App. pp. 30, 31, *infra*) provides that vested property

> shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States.

This Court has had occasion to comment on the intended flexibility and breadth of these Section 5 (b) powers, conferred by the First War Powers Act. See *Markham* v. *Cabell,* 326 U. S. 404, 411–413; *Clark* v. *Uebersee Finanz-Korp.,* 332 U. S. 480, 485–486; *Silesian-American Corp.* v. *Clark,* 332 U. S. 469, 479; see also S. Rep. 911, 77th Cong., 1st Sess., p. 2; H. Rep. 1507, 77th Cong., 1st Sess., pp. 2–3.*

The District Court concluded, first, that the settlement was authorized by Section 5 (b) as a partial return, the right to make such a return having been reserved explicitly in the Vesting Order (R. 75–76, 8–9) (*supra,* p. 5). In this the court was surely correct, for in simplest terms the settlement was the return of the non-enemy part conceded, for settlement purposes, to be Mr. Halbach's and the retention of the part which for settlement purposes was conceded to be enemy.

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* In addition to the broad purposes of the Act, as stated by the two Congressional committees in the reports cited in the text, there was explicit recognition on the floor of the Senate that the enlarged powers of Section 5 (b) would permit such payments in settlement as were made to Halbach. In the course of the debate in the Senate on the First War Powers Act, the following transpired (87 Cong. Rec. 9845):

"Mr. Taft. There was always a good deal of scandal and danger of scandal in connection with the office of the Alien Property Custodian, particularly because *when a man came in and claimed property back there perhaps was nobody on*

Second, the District Court held that the settlement was authorized by the provision of Section 5 (b) that vested property shall be "dealt with" in the interest of the United States (R. 76–77). The settlement was also an exercise of other of the powers granted in Section 5 (b). It was a "use"; and viewed either as a quieting of title to the portion of the property retained, as the satisfaction of an adverse claim to the property vested, or as the exercise of a vested option, the settlement was an act incidental to administration or to liquidation. *Cf. Silesian-American Corp.* v. *Clark,* 332 U. S. 469, 477. That a relinquishment of property rights in the course of a settlement is within the Section 5 (b) powers has been held in the only other case on the point. *Standard Oil Co.* v. *Markham,* 64 F. Supp. 656, 666–667 (S. D. N. Y.), modified *sub nom., Standard Oil Co.* v. *Clark,* 163 F. 2d 917, 932 (C. A. 2), certiorari denied, 333 U. S. 873.

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the other side. I wonder if any such danger is guarded against in this particular measure, or whether that is something to be dealt with after the war is over.

"Mr. Van Nuys. *I think that is largely a matter of administration rather than of legislation.* I may be mistaken about that, but I think so.

"Mr. Taft. If the time ever comes when there is an alien property custodian with power to give property back to anybody or pay him for it, it seems to me some better provision should be made than was made after the World War.

"Mr. Van Nuys. I will say to the Senator from Ohio that I think that is largely an administrative matter, and that *the power here is ample to put in operation such administrative processes as will accomplish those results*" [emphasis added].

Petitioner makes much of the fact that Section 32 (60 Stat. 50, as amended, 50 U. S. C. App. 32), enacting detailed conditions for the return of property to enemies, was not passed until after this settlement (Pet. 5, 21–22, 23, n. 6, 26–28). But Section 5 (b) gave authority for the action here taken, at the time of the action. It is of no moment that Section 32 may thereafter have limited the power to make administrative returns (other than those made in the course of settlements of litigated cases). And, in any event, the return in this case was of the portion of the property which by compromise agreement was agreed to be non-enemy, and thus not within the area of concern of Section 32.

2. *Section 9 (a).*—Section 9 (a) of the Act has been said to govern "the administrative consideration and allowance of claims to property transferred to the Custodian." *McGrath* v. *Manufacturers Trust Co.*, 338 U. S. 241, 246, n. 8. It provides that on filing of notice of claim the Custodian, as delegate of the President,[7] may return either the property claimed or "the interest

[7] The President's authority has been delegated to the Custodian. Sec. 1, Executive Order No. 8136, May 15, 1939, 4 F. R. 2044; Sec. 1, Executive Order No. 9142, April 21, 1942, 7 F. R. 2985. "The Alien Property Custodian, in taking over the administration of the Trading with the Enemy Act, is entitled to the full scope of its permanent provisions whether found in Sec. 5 (b) or Sec. 9 (a) or elsewhere." Mr. Justice Burton, concurring in *Markham* v. *Cabell*, 326 U. S. 404, at 424.

therein to which the President shall determine said claimant is entitled." (App. p. 32, *infra*.) Halbach having filed such a claim (R. 7, 12), a return of part of the property, as in this settlement agreement, became plainly authorized and the courts below so held (R. 78–79).

Petitioner seems to contend that the courts below misconstrued Section 12 of the Act (App. p. 33, *infra*) in holding it no bar to the exercise of authority under Sections 5 (b) or 9 (a). But it appears rather that petitioner admits that the requirement, in Section 12, of deposit of moneys in the Treasury is no bar if (as has been shown above) the payment in settlement was authorized under other provisions of law (Pet. 28–29). In any event, Section 12 did not impede the mechanics of payment in settlement, for the variety of reasons stated by the District Court.*

3. *The powers of the Attorney General to compromise Government litigation.*—The settlement

* To the review by the District Court of petitioner's argument on Section 12 (R. 77–78), it might be added that the power of the Secretary of the Treasury to withdraw moneys from the Treasury, granted by Section 5 (d) of Executive Order No. 2813 of February 26, 1918, was thereafter transferred to the Custodian and repeatedly confirmed in him. Executive Order 6237–A, July 30, 1933, 50 U. S. C. App. 12 n., p. 5659; Sec. 1, Executive Order No. 6694, May 1, 1934; Sec. 1, Executive Order No. 8136, May 15, 1939, 4 F. R. 2044; Sec. 1, Executive Order No. 9142, April 21, 1942, 7 F. R. 2985. See *Markham* v. *Cabell*, 326 U. S. 404, concurring opinion of

is entitled to the support of the Custodian's authority under the Act, discussed above, because the Custodian recommended execution of the settlement (R. 105, 108–109). But it was executed by the Attorney General, as counsel for the Custodian and the United States, the suit being one against the United States (R. 16, 89, 102). Sec. 5, Executive Order No. 9142, April 21, 1942, 7 F. R. 2985; Sec. 5, Executive Order No. 6166, June 10, 1933, 5 U. S. C. (1952 ed.) Secs. 124–132, n., p. 112, 114; *Sutherland* v. *International Ins. Co. of New York,* 43 F. 2d 969 (C.A. 2), certiorari denied, 282 U. S. 890; *Cummings* v. *Deutsche Bank,* 300 U. S. 115, 118; *Becker Co.* v. *Cummings,* 296 U. S. 74, 78; *Banco Mexicano* v. *Deutsche Bank,* 263 U. S. 591, 603. Accordingly, the Attorney General had his traditional power to make the compromise, though it involved relinquishment of claim to part of the property in suit. R. 73–74; *Confiscation Cases,* 7 Wall 454; *New York* v. *New Jersey,* 256 U. S. 296, 307–308; *United States* v. *San Jacinto Tin Co.,* 125 U. S. 273, 278–280, 284–285; *Castell* v. *United States,* 98 F. 2d 88, 91 (C.A. 2), certiorari denied, 305 U. S. 652; *Standard Oil Co.* v. *Markham,* 64 F. Supp. 656, 666–667 (S. D. N. Y.), modified *sub*

Mr. Justice Burton, at 424.

The President has explicitly forestalled any challenge to the authority of either the Secretary or the Custodian, based on an allegedly exclusive delegation to the other. Sec. 12, Executive Order No. 9193, July 6, 1942, 7 F. R. 5205.

nom. Standard Oil Co. v. *Clark,* 163 F. 2d 917, 932 (C.A. 2), certiorari denied, 333 U. S. 873; 38 Op. A. G. 98; 2 Op. A. G. 482, 486; Sec. 35, Judiciary Act of 1789, 1 Stat. 73, 92; Act of June 22, 1870, 16 Stat. 162, 164, 5 U. S. C. 291, 306, 309, 316.

Petitioner contends that these authorities are inapplicable where the Attorney General settles "in a manner prohibited by statute" (Pet. 31, n. 14), but no statute is or can be cited which controls the power of the Attorney General to settle cases under the Trading with the Enemy Act. Certainly, neither Section 5 (b), Section 9 (a), nor Section 12 *prohibits* the Attorney General from exercising his normal authority to settle and compromise Government litigation. (*Supra,* pp. 22–26). It follows that the contention of lack of authority must fail. *United States* v. *California,* 332 U. S. 19, 27; *Swift & Co.* v. *United States,* 276 U. S. 311, 331.

CONCLUSION

The two courts below have concluded that (R. 79, 399):

> Under the facts and law the settlement of this litigation was properly entered into and carried to a conclusion by the Attorney General and the Alien Property Custodian representing the United States. It should not be set aside.

It is respectfully submitted that the petition for the writ of certiorari should be denied.

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MARCH 1954.

APPENDIX

Trading with the Enemy Act, 40 Stat. 411, as amended, 50 U. S. C. App. 1, *et seq.*

* * * * *

SECTION 5

* * * * *

(b) (1) During the time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, and under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise—

(A) investigate, regulate, or prohibit, any transactions in foreign exchange, transfers of credit or payments between, by, through, or to any banking institution, and the importing, exporting, hoarding, melting, or earmarking of gold or silver coin or bullion, currency or securities, and

(B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest,

by any person, or with respect to any property, subject to the jurisdiction of the United States; and any property or interest of any foreign country or national thereof

shall vest, when, as, and upon the terms, directed by the President, in such agency or person as may be designated from time to time by the President, and upon such terms and conditions as the President may prescribe such interest or property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States, and such designated agency or person may perform any and all acts incident to the accomplishment or furtherance of these purposes; and the President shall, in the manner hereinabove provided, require any person to keep a full record of, and to furnish under oath, in the form of reports or otherwise, complete information relative to any act or transaction referred to in this subdivision either before, during, or after the completion thereof, or relative to any interest in foreign property, or relative to any property in which any foreign country or any national thereof has or has had any interest, or as may be otherwise necessary to enforce the provisions of this subdivision, and in any case in which a report could be required, the President may, in the manner hereinabove provided, require the production, or if necessary to the national security or defense, the seizure, of any books of account, records, contracts, letters, memoranda, or other papers, in the custody or control of such person; and the President may, in the manner hereinabove provided, take other and further measures not inconsistent herewith for the enforcement of this subdivision.

* * * * *

SECTION 9

(a) Any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, or to whom any debt may be owing from an enemy or ally of enemy whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States, or of the interest therein to which the President shall determine said claimant is entitled: *Provided,* That no such order by the President shall bar any person from the prosecution of any suit at law or in equity against the claimant to establish any right, title, or interest which he may have in such money or other property. If the President shall not so order within sixty days after the filing of such application or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may institute a suit in equity in the Supreme Court of the District of Columbia or in the district court

of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the court shall determine said claimant is entitled. If suit shall be so instituted, then such money or property shall be retained in the custody of the Alien Property Custodian, or in the Treasury of the United States, as provided in this Act, and until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied by payment or conveyance, transfer, assignment, or delivery by the defendant, or by the Alien Property Custodian, or Treasurer of the United States on order of the court, or until final judgment or decree shall be entered against the claimant or suit otherwise terminated.

* * * * *

SECTION 12

All moneys (including checks and drafts payable on demand) paid to or received by the alien property custodian pursuant to this Act shall be deposited forthwith in the Treasury of the United States, and may be invested and reinvested by the Secretary of the Treasury in United States bonds or

United States certificates of indebtedness, under such rules and regulations as the President shall prescribe for such deposit, investment, and sale of securities; and as soon after the end of the war as the President shall deem practicable, such securities shall be sold and the proceeds deposited in the Treasury.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 562

ANNE HALBACH BUMSTED AND MARY ELIZABETH KEMMERER, Successors in Interest to Elizabeth S. Halbach and Franklin H. Stafford, Trustees under Agreement of Trust Made by Ernest K. Halbach, dated December 6, 1940, *Petitioners*,

v.

JAMES E. MARKHAM, as Alien Property Custodian, *Respondent*.

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.